BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RAFAELA MONCADA, Claimant, v. OSVALDO GONZALEZ, Employer, and PAULA INSURANCE, c/o WESTERN GUARANTY FUND SERVICES, Surety, Defendants.	)	**IC 2004-010943** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed April 24, 2007

INTRODUCTION

Pursuant to Idaho § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on April 11, 2006. Claimant was present and represented by Rick D. Kallas of Boise. Mark C. Peterson, also of Boise, represented Employer/Surety. Jared Clark served as interpreter. Oral and documentary evidence was presented. The record remained open for the taking of one post-hearing deposition. The parties submitted post-hearing briefs and this matter came under advisement on January 16, 2007.

ISSUES

The issues to be decided as the result of the hearing are:

1. Whether Defendants are liable for additional total temporary disability (TTD) benefits;

2. Whether, and to what extent, Claimant has incurred whole person permanent partial impairment (PPI);

3. Whether, and to what extent, Claimant has incurred whole person permanent partial disability (PPD) in excess of PPI;

4. Whether apportionment under Idaho Code § 72-406 is appropriate; and

5. Whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine.[1]

CONTENTIONS OF THE PARTIES

Claimant contends that she is entitled to PPI of 23% of the whole person without apportionment as opined by her IME physician as the result of an uncontested "trip and fall" accident. She further contends that Defendants miscalculated her TTD benefits and, when properly calculated, she is owed more money. Finally, Claimant contends that when all medical and non-medical factors are taken into account, she is an odd-lot worker.

Defendants counter that their IME physician appropriately assigned a 20% whole person PPI rating and also appropriately apportioned 50% of that rating to pre-existing conditions. They also counter that they appropriately calculated Claimant's TTD benefits based on her status as a

[1] Defendants initially objected to this issue at hearing on the ground that they had not been notified that this was an odd-lot case and were not prepared to rebut Claimant's *prima facie* showing of odd-lot status should the same be established. Rather than continuing the hearing, it was agreed that Defendants' vocational expert be allowed to take necessary steps by way of supplementing his pre-hearing report to rebut any presumption regarding odd-lot status as deemed necessary. Claimant agreed not to argue against the admission of any vocational evidence newly developed post-hearing regarding rebutting the presumption of odd-lot status should a *prima facie* case in support thereof be established.

seasonal worker. Finally, while Claimant may have incurred some disability in excess of her impairment, she is by no means an odd-lot worker and even if she has established a *prima facie* case in support thereof, they have rebutted that presumption by showing that there are actual jobs regularly and continuously available within her restrictions in her labor market that she has a reasonable chance of obtaining.

Claimant responds by pointing out that of the jobs identified by Defendants' vocational expert, most are beyond Claimant's physical capabilities, some are beyond her mental capabilities and she has no realistic chance of securing any of them.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and vocational consultant Mary Barros-Bailey taken at the hearing.

2. Claimant's Exhibits 1-14 admitted at the hearing.

3. Claimant's Exhibit 15 (Permanent Resident Alien Card) admitted without objection post-hearing.

4. Defendants' Exhibits A-L admitted at the hearing.

5. The post-hearing deposition of William C. Jordan with two exhibits taken by Defendants on September 19, 2006. Claimant objected to certain portions of Exhibits M to Mr. Jordan's deposition. Claimant's objection is sustained as to any job description or testimony associated therewith that was previously excluded by the Order Granting Claimant's Motion in Limine filed May 24, 2006. However, any testimony regarding job descriptions or the job descriptions themselves adduced or prepared after the hearing and in defense of Claimant's odd-lot argument is or are admitted.

After having considered all the above evidence, the briefs of the parties and the Recommendation of the Referee, the Commission hereby issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Claimant was 56 years of age and resided in Fruitland at the time of the hearing. She speaks and reads no English. She was briefly educated in Mexico (sporadically over 4 years from ages 4-11). She did not work outside the home in Mexico and worked primarily as a field worker since coming to the United States in 1992.

2. On June 20, 2002, Claimant attempted to step over a corrugate and slipped and fell landing on her buttocks; Defendants accepted her claim. Claimant continued working until August 8, 2002, when she was unable to continue due to problems with walking.

3. Claimant first sought medical attention on August 6th when she presented to David Owens, a Fruitland chiropractor. He obtained x-rays that revealed spondylolisthesis of L5 over S1 with underlying degenerative disk disease. Dr. Owens referred Claimant to Randolph E. Peterson, M.D., an orthopedist.

4. Claimant first saw Dr. Peterson on September 4, 2002. He ordered bone and CT scans that revealed a pre-existing bilateral spondylolysis with a Grade I to II spondylolisthesis at L5-S1. He prescribed physical therapy that hurt more than helped and referred Claimant to a physiatrist.

5. Claimant first saw physiatrist Tracy R. Johnson, M.D., on November 12, 2002. He recorded her past medical history as obesity and hypertension. He noted her height to be 5'5" and her weight to be 261 pounds. He administered a trigger point injection, released her to return to work with restrictions and discontinued physical therapy. After a few follow-up visits

with no improvement, Dr. Johnson released Claimant from his care on February 4, 2003, and recommended an IME.

6. On May 20, 2003, Claimant saw Michael T. Phillips, M.D., for an IME. Dr. Phillips diagnosed an "in part" permanent aggravation of Claimant's pre-existing spondylolisthesis at L5-S1 as a direct result of Claimant's industrial accident. He noted that Claimant's spondylolisthesis had undergone spontaneous anterior auto fusion, was stable, and no further treatment was required. Dr. Phillips assigned a 20% whole person PPI rating for segmental fusion of a motion segment and apportioned 50% of that rating to Claimant's pre-existing spondylolisthesis.

7. On February 2, 2005, Claimant saw Michael R. McMartin, M.D., a physiatrist, for an IME at her attorney's request. She presented with the chief complaint of constant low back pain. Dr. McMartin noted that, per history, walking, standing, and prolonged sitting aggravated Claimant's pain. Based on the AMA's *Guides to the Evaluation of Permanent Impairment*, Fifth Edition, (AMA *Guides*) DRE Lumbar Category IV, Dr. McMartin assigned a 23% whole person PPI rating with no apportionment. He opined that no further diagnostic testing or therapeutic intervention was required. Both Dr. McMartin and Dr. Phillips assigned permanent physical restrictions that will be discussed later.

DISCUSSION AND FURTHER FINDINGS

TTD benefits:

8. Claimant contends that Employer has admitted in writing that she earned $6.50 an hour and worked 8 hours a day 6 days a week for a total of 48 hours a week. Based thereon, Claimant argues that her average weekly wage is $312.00 ($6.50 an hour x 48 hours a week = $312.00) and her TTD compensation rate is $209.04 ($312.00 x 67% = $209.04). Therefore, she

is owed $8,660.23 in TTD benefits ($209.04 x 41 weeks + 3 days = $8,660.23). Defendants have paid $7,156.47 thus resulting in an underpayment of $1503.76.

9. Defendants argue that Claimant, by her testimony is a seasonal worker; she typically worked from April or May through the fall of any given year. Therefore, Idaho Code § 72-419(6) regarding seasonal occupations applies in fixing TTD benefits. They calculate as follows: Claimant earned $11,044.00 in 2001. Prorating the 5 months of her 2001 salary ($4,601.00) August-December and adding her entire 2002 salary for January-July ($5,227.00) her 12-month earnings are $9,828.00. Dividing Claimant's 12-month pre-accident (6-20-02) earnings by 50 weeks provides an average weekly wage of $196.56. Based on that figure, Claimant would be owed $5,455.73. Thus, Defendants argue that Claimant has been overpaid $1,700.74.

10. While Claimant testified and Employer admitted that she earned $6.50 an hour for a 48-hour week, those admissions do not answer the question of whether her work for Employer was seasonal; Claimant testified to the contrary. All the admissions reveal is that for the time she worked for Employer she earned the admitted amount and worked the admitted hours. Claimant's testimony as a whole indicates that she was a seasonal worker. *See generally* Hearing Transcript, pages 47 and 53-58. Therefore, the Commission finds that Claimant was a seasonal worker at the time of her accident and TTD benefits were appropriately calculated and paid. The Commission further notes that Defendants are not seeking any reimbursement from Claimant.

PPI benefits:

11. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is

considered stable or nonprogressive at the time of the evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

12. Claimant contends Dr. Phillips' PPI rating is flawed; the Commission agrees. Without any evidence that Claimant's pre-existing spondylolisthesis caused her to seek medical treatment[2] or miss time from her work as a field hand, Dr. Phillips nonetheless apportioned 50% of his 20% PPI to pre-existing conditions. As Claimant points out, the AMA *Guides* are instructive regarding apportionment.

> 1.6b **Apportionment analysis**
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> **Apportionment** analysis in workers' compensation represents a distribution or allocation of causation among multiple factors that caused or significantly contributed to the injury or disease and resulting impairment. The factor could be preexisting injury, illness, or impairment. In some instances, the physician may be asked to apportion or distribute a permanent impairment rating between the impact of the current injury and the prior impairment rating. Before determining apportionment, the physician needs to verify that all of the following information is true for an individual:
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> 1. There is documentation of a prior factor.
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> 2. The current permanent impairment is greater as a result of the prior factor (ie, prior impairment, prior injury, or illness).
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> 3. There is evidence indicating the prior factor caused or contributed to the impairment, based on a reasonable probability (> 50% likelihood).

[2] There is mention in certain pre-accident medical records that Claimant complained of back pain; however, such scant references are made in conjunction with other conditions for which Claimant actually sought treatment.

AMA *Guides*, Fifth Edition, p. 11.

13. Dr. Phillips failed to address the "protocol" established by the *Guides* and, hence, his apportionment analysis lacks credence. On the other hand, Dr. McMartin understood that Claimant had never sought treatment specifically for a low back condition and had never missed any work related thereto. His PPI analysis is reasonable and the Commission finds that Claimant has incurred whole person PPI of 23% without apportionment as a direct result of her June 20, 2002, industrial accident.

PPD benefits:

14. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit

is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

15. The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

16. Claimant was 56 years of age at the time of the hearing. She is morbidly obese. She had approximately four years of sporadic education in Mexico, where she was born. She did not work outside of the home until she came to the United States in 1992. Her work history once here consists almost exclusively of fieldwork, to which she is now unable to return. At the time of the hearing, Claimant had let her Permanent Alien Work Permit to lapse, but she has since been "reinstated."

The vocational experts

For Claimant: Mary Barros-Bailey

17. Claimant retained Mary Barros-Bailey to assist her with vocational issues. Ms. Barros-Bailey's credentials are well known to the Commission and will not be repeated here. Her testimony regarding the same may be found at pages 93-98 of the Hearing Transcript. Ms. Barros-Bailey reviewed medical records and interviewed and tested Claimant. She also attended the interview with Claimant and Defendants' vocational expert. Ms. Barros-Bailey's vocational testing of Claimant revealed that she has no English-speaking abilities; pre-school reading abilities in Spanish; 2nd grade equivalency in math; 1st percentile in reading

comprehension; 1st percentile in problem solving; and an overall academic level of between the 1st and 2nd grade, meaning she is illiterate in both Spanish and English.

18. Ms. Barros-Bailey identified the following physical restrictions applicable to Claimant: Dr. Phillips – light work category; bending, stooping, and twisting on a less than occasional basis with periodic change of positions. Dr. McMartin – light work category; avoid bending, stooping, and twisting whenever possible.

19. Ms. Barros-Bailey identified the following non-medical factors:

> There are a variety. With Rafaela (Claimant), she started working in her 40's, early 40's, and she has a work life of ten years. She's now 56, so about ten [*sic*- four?] years above the time that she was injured. She worked in unskilled labor. And so by definition, she has no transferable skills. And you cannot take somebody who has got unskilled labor and see that they qualify for skilled labor. And, methodologically, it's against our methods.
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> She also depends on others for travel.[3] So she would get work where she had people who could transport her to those jobs. She does not drive. She lives in a labor market that is fairly rural. It's not considered urban, such as Ada and Canyon County area, where there are a lot more jobs. And so her reasonable commuting area is restricted compared to somebody else I might have evaluated who had the transportation abilities.
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> Q. (By Mr. Kallas): What do you think are the most significant barriers to her finding and maintaining regular continuous employment?
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> A. It's a constellation of factors. It's the limitations she has provided. She is an unskilled worker. She has not worked in skilled employment. And the kinds of jobs that exist in that area require prolonged standing, for the most part. They take the ability to be able to find work. I called employers that her kids are employed with to see if they had jobs that she can commute with them on, you know, to be able to plug into the same transportation systems that she had depended on before. If she does not have those support systems in terms of transportation, how is she going to get around, type of thing.
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> And so it's a whole constellation of factors, from her illiteracy in English and Spanish, from her age, from her functional limitations, from the labor market in that area, from her pretty deficient transportation system that come together in terms - - and her unskilled work history come together to make it improbable that she would find work. It's possible. It's not probable.

[3] Claimant has never learned to drive.

Hearing Transcript, pp. 103-104, 113.

For Defendants: William C. Jordan

20. Defendants retained William C. Jordan to assist them with vocational issues and to provide a disability evaluation. Mr. Jordan's credentials are well known to the Commission and will not be repeated here. His testimony regarding the same may be found at pages 10-16 of his September 19, 2006, deposition. Mr. Jordan met with Claimant on February 3, 2006. He reviewed pertinent medical records and prepared a report dated March 4, 2006. He was initially retained to identify jobs Claimant may be capable of securing and performing rather than to find her an actual job. He listed Claimant's permanent physical restrictions as follows: Dr. Johnson – lifting 50 pounds occasionally; 25 pounds frequently; 15 pounds continuously; and limited bending, twisting, and stooping. Dr. Johnson attributed all of those restrictions to Claimant's pre-existing spondylolisthesis. Dr. Phillips – 25 pounds maximum lifting and occasional (less than 1/3 of the time) bending, stooping, and twisting. Dr. McMartin – 25 pounds occasionally; 15 pounds frequently; avoid bending, stooping, and twisting when possible; and ad lib change of positions.

21. Mr. Jordan testified that he is of the opinion that Claimant has incurred whole person PPD of between 30-35% with 50% attributable to preexisting conditions. Ms. Barros-Bailey testified that she is of the opinion that Claimant has incurred whole person PPD of 100%. The Commission finds that when considering Claimant's labor market, age, illiteracy, language barriers, unskilled work history, work restrictions, morbid obesity, lack of transportation, loss of access to a portion of her pre-injury labor market, and her personal circumstances, she has incurred whole person PPD of 60% inclusive of her 23% whole person PPI.

Apportionment:

22. Idaho Code §72-406 provides that, in cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury. As discussed above, the Commission finds that Claimant had never sought treatment specifically for a low back condition and had never missed any work related thereto that has increased or prolonged the degree or duration of Claimant's disability. Therefore, apportionment is not appropriate.

Odd-lot:

23. Claimant contends that she falls within the definition of an odd-lot worker. There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established. The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939P.2d 854, 857 (1997). An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), *citing Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable "in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road*

Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), *citing Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

24. A claimant may satisfy his or her burden proof and establish total permanent disability under the odd-lot doctrine in any one of three ways:

1) By showing that he or she has attempted other types of employment without success;

2) By showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other work and other work is not available; or

3) By showing that any efforts to find suitable work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995). A prima facie case of odd-lot status is only established if "the evidence is undisputed and is reasonably susceptible to only one interpretation." *Magee v. Thompson Creek Mining Co.*, 142 Idaho 761, 766, 133 P.3d 1226 (2006) (quoting *Thompson v. Motel 6*, 135 Idaho 373, 376, 17 P.3d 874, 877 (2001)).

25. Claimant has not attempted other work or had vocational counselors or employment agencies search for work for her without success. Therefore, Claimant has failed to prove odd-lot status by the first two methods discussed in *Lethrud*.

26. Claimant contends that she has demonstrated that it would be futile for her to search for work. Ms. Barros-Bailey testified that while it was possible, it was not probable that Claimant will find work that is continuously and regularly available in her labor market. Mr. Jordan's report listed a variety of positions that Claimant could hold. Mr. Jordan spoke with employers directly regarding Claimant's physical restrictions and additional limitations, including her inability to communicate in English. Mr. Jordan found the majority of the

employers he spoke with receptive to considering Claimant for a position if she were to apply. In fact several employers noted that their workforce primarily consists of Hispanic individuals who have limited or no English speaking capabilities, and those employers have supervisory personnel who provide translation services to those employees. In addition, Dr. Phillips approved many job site evaluations where Claimant's restrictions could be met with minimal or no modifications. Mr. Jordan found actual jobs which Claimant is able to perform or for which she can be trained, resulting in a reasonable opportunity to be employed. Defendants' Exhibit M.

27. The Commission is persuaded by Mr. Jordan's analysis and report, finding that positions exist which are suitable for Claimant. Claimant has failed to prove that any efforts to find suitable work would be futile. Therefore, the Commission finds that Claimant has not proven her entitlement to total and permanent disability under the odd-lot doctrine by the third prong of the *Lethrud* method.

CONCLUSIONS OF LAW AND ORDER

1. Claimant is not entitled to additional TTD benefits.

2. Claimant is entitled to PPI benefits of 23% of the whole person without apportionment.

2. Claimant suffered permanent partial disability rated at 60% of the whole person, inclusive of her 23% whole person PPI.

3. Apportionment pursuant to Idaho Code § 72-406 is not appropriate.

4. Claimant has failed to prove that she is entitled to total and permanent disability benefits pursuant to the odd-lot doctrine.

5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this _24th_ day of ___April_____, 2007.

INDUSTRIAL COMMISSION

_/s/_____
James F. Kile, Chairman

_/s/_____
R.D. Maynard, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _24th day of ___April____, 2007, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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sjt

__/s/_____